Dawama Sdn Bhd v The Board of Control of Dewan Bahasa dan Pustaka

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC(ARB)-18–04 OF 2018
AHMAD FAIRUZ J
8 DECEMBER 2020

Civil Procedure — Arbitration — Award — Question of law — Reference under s 42 of the Arbitration Act 2005 — Determination of what amounted to 'question of law' — Whether there were merits in questions raised — Whether judge should intervene with findings of arbitrator — Rules of Court 2012 O 69 rr 2, 4 & 6

The plaintiff ('Dawama') sought to invoke s 42 of the Arbitration Act 2005 ('the Act') and O 69 rr 2(1)(h), 4(b) and/or (c) and 6 of the Rules of Court 2012 for this court to determine five questions of law arising from a final award awarded by the arbitrator in an proceeding. Dawama also sought to vary part of the final award or in the alternative, to remit that part of the final award to the arbitrator for reconsideration. Vide a concession agreement ('CA'), with a view of privatising its pre-press, design, type-setting, printing, distribution and marketing activities ('prescribed activities'), the defendant ('DBP') awarded a 12 year concession to Dawama. Under the CA, Dawama would take over, operate, manage and maintain at its own costs and expense, the prescribed activities in relation to: (a) free textbooks provided to primary and secondary school students under 'Buku Teks Skim Pinjaman' scheme set up by Government ('BTSP'); (b) all textbooks other than BTSP and the general titles for direct sale to the public ('open market') ('textbooks'); and (c) books and/or magazines published by DBP other than the textbooks ('general titles') ('the publications'). Pursuant to the CA and throughout the concession period, DBP placed two main orders of textbooks with Dawama, namely: (i) reprinting of existing textbooks ('reprint orders'); and (ii) new textbook titles ('new title orders') ('BTSP orders'). In 2011, no 2012 BTSP orders were placed by DBP. This was due to DBP's position that Dawama was in a critical financial position and was unable to demonstrate that it was capable of carrying out the printing and distribution of 2012 BTSP resulting in DBP to undertake the printing of 2012 BTSP by itself. Dawama claimed that by failing to place the orders, DBP had breached the CA. Likewise, no 2015 new title orders were placed by DBP in 2014 due to DBP's position that the CA would soon expire. Dawama, on the other hand, submitted that DBP's conducts gave indication to Dawama that they regarded the CA as continuing. In consequence of the dispute that arose, a reference to arbitration was made. Dawama's application herein was in relation to the claims in the final award which had been dismissed

or denied by the arbitrator namely: (A) the sum of RM24,932,475.11 representing the loss arising from DBP's failure to place the 2012 BTSP orders with Dawama; (B) the sum of RM 23,140,804.77 representing the loss arising from DBP's failure to place the 2015 new title orders; and (C) in the alternative to (B) above, the sum of RM16,420,715.06 representing Dawama's quantum meruit claim for the value of works and/or worth of its labour and services for the prescribed activities in relation to the 2015 new title orders. The questions posed by Dawama were: (1) whether the tribunal erred in law in relying upon the decisions in: (I) *Kamuja Hartamas Sdn Bhd (formerly known as Aras Suasana Sdn Bhd) v Bank Kerjasama Rakyat Malaysia Bhd* [2017] 3 MLJ 668; and (II) *Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm) ('Glory Wealth'), in reaching its finding that Dawama had to prove that it was in a position to perform the contract in 2011 in order to establish a claim in damages; (2) whether the tribunal's failure to consider evidence actually led by Dawama in proving such damage amounts to a breach of natural justice on the part of the tribunal or otherwise constitutes an error of law; (3) whether the tribunal had correctly applied the principles laid down in the s 74 of the Contracts Act 1950 in determining the compensation payable to Dawama by reason of breaches of contract by DBP; (4) whether DBP was legally obliged: (I) to continue performing its obligation under the CA by reason of a finding of fact by the tribunal that DBP was estopped from claiming that the contract had expired through effluxion of time; and (II) by reason thereof was liable to pay damages to Dawama; (5) whether in assessing damages on a quantum meruit basis, the tribunal was precluded in law from considering and/or taking into account the profit to be gained from the contract by the innocent party (Dawama) in determining the market price and/or value of works and/or services done by it.

Held, dismissing originating summons with costs:

(1) There was no error in the applicability of the laws by the arbitrator to warrant an intervention by this court under a s 42 reference. There was no need for this court to decide on a 'correct position' as alleged by Dawama between the cases of *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382 and *Glory Wealth* because: (a) there was no conflict between both cases; (b) the principles in *Glory Wealth* were consistent with the English Supreme Court case of *Bunge SA v Nidera BV (formerly known as Nidera Handelscompagnie BV)* [2015] UKSC 43 which accepted *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353; and (c) the principles in *Glory Wealth* were consistent with the compensatory principle of damages as applied and adopted by the Malaysian courts. Be that as it may, any conflicting view on points of law do not give rise to a question of law (see paras 28–29).

(2) Section 42 challenge could not be one that was mixed with any finding of facts. In determining who the guilty party was, it was incumbent to

relook at the basis on which the arbitrator arrived at as to why he did not find DBP as the guilty party. From a perusal of the award, there was a finding by the arbitrator that he took the admission of one Dato' Norhisham, the witness for Dawama, that in 2011, Dawama was in financial difficulties. This resulted in Dawama being unable to purchase the relevant materials namely paper in 2011. As a result of which, DBP had to undertake the BTSP 2012 orders prescribed activities themselves. Such a finding by the arbitrator was clearly a finding of facts. The argument as to who bears the burden of proving the ability to perform the contract had been displaced by this finding of fact. If Dawama had admitted that they were not able to perform the BTSP 2012 orders prescribed activities, no longer could it claim to be entitled to any form of compensation as a result of their own inability to perform the contract. The arbitrator was correct at concluding in the manner he did by relying on *Kamuja* where the Court of Appeal touched on the need for the party claiming to be suffering damages to show that it could perform its part of the bargain and thus entitled to damages (see paras 30–31).

(3) The position in law with regards to burden of proof and onus of proof was settled. It lay with Dawama. As it was Dawama's claim that it had suffered losses in the sum of RM24,932,475.11 for the 2012 BTSP orders, Dawama had the burden as well as the onus of proof. In considering the question posed by Dawama, it was inevitable for this court to revert to the finding of facts arrived at by the arbitrator when he concluded that Dawama itself was unable to show that it was able to perform its part of the bargain. This finding was arrived primarily from the assessment of evidence of Dawama's main witness, Dato' Norhisham. As such, it no longer was a question of pure law. In the circumstances, question (1) did not qualify as a question that could be used as reference under s 42 of the Act (see paras 33–34 & 37).

(4) The failure of the arbitrator to consider the evidence of one Datuk Luqman could not be the foundation to insist that a breach of natural justice had occasioned. Therefore, question (2) failed to meet the required threshold for any consideration by this court (see paras 43 & 45).

(5) Question (3) was overly general and broad. The mere mention of s 74 of the Contracts Act and its applicability was insufficient. To pass the requisite threshold, a reader of the question must be able to identify the question of law that fell into error arising out of the award. The question of law must be able to confront the reasoning by the arbitrator in the award. There were no grounds stated by Dawama on which the reference was sought. It was a general and open statement which this court was unable to determine the exact issue or error to be determined arising from

the award. Therefore, as question (3) was concerned, the requisites of a s 42 reference had not been met (see paras 52 & 54–55).

(6) There was no misdirection on the part of the arbitrator when he concluded that Dawama was not entitled to the primary claim of the 2015 new title orders. There was a clear finding of fact by the arbitrator that he found Dawama not being entitled to the 2015 new title orders. The arbitrator's findings in relation to the 2015 reprint orders did not extend to the 2015 new title orders. Therefore, it was clear to the arbitrator from the chronology of events and minutes of meetings that it was the intention of the parties that on the expiry of the CA, DBP would take over the prescribed activities in relation to the 2015 new title orders. There were no inconsistencies in the finding arrived by the arbitrator. Inconsistencies in the findings of the arbitrator, even if there were, did not immediately entitle Dawama to challenge the Final Award. This was because an error of fact did not amount to a question of law (see paras 61–62, 67 & 69).

(7) It was clear what Dawama was seeking the court to carry out a re-examination of the facts the arbitrator undertook. It could not be a backdoor attempt to urge the court to revisit the findings of the arbitrator. The distinction between a s 42 reference and an appeal was a fine one. In assessing question (4), it inevitably would require this court to revisit the facts once again which was akin to an appeal. Such an exercise could not be undertaken by the court. In conclusion, question (4) was a question of fact which had been dressed up as a question of law. It merited no consideration (see paras 71–72).

(8) The arbitrator did not err in law when he opined that Dawama was not entitled to the RM 16,420,715.06 claim for quantum meruit ('quantum meruit sum'). The arbitrator's refusal to allow the claim for the quantum meruit sum stemed from the fact that there was failure by Dawama to substantiate the said claim. In dismissing the quantum meruit claim, the arbitrator was of the view that Dawama had taken the profits of the entire 2015 new title orders into consideration when calculating the quantum meruit sum. The calculation could not be based on the entire contract value that Dawama anticipated to earn. The costs incurred must be sufficiently shown and proven to the tribunal based on actual work done. Therefore, question (5) posed in this OS was dismissed (see paras 75, 78, 88–89, 94–95 & 99).

(9) There was no reason to alter or vary the finding of the arbitrator. There was also no reason for this court to send this matter back to the arbitrator. The final award was written in a systematic and clear manner. It had to be taken in the proper context and any attempts to butcher and dissect the said award with the intention to look for errors could not be supported (see para 100).

[Bahasa Malaysia summary

Plaintif ('Dawama') memohon untuk mengguna pakai s 42 Akta Timbang Tara 2005 ('Akta tersebut') dan A 69 kk 2(1)(h), 4(b) dan/atau (c) dan 6 Kaedah-Kaedah Mahkamah 2012 bagi mahkamah ini menentukan lima persoalan undang-undang yang timbul daripada award muktamad yang diberikan oleh penimbang tara dalam satu prosiding. Dawama juga memohon perubahan sebahagian daripada award muktamad atau sebagai alternatif, untuk menyerahkan bahagian award muktamad tersebut kepada penimbang tara untuk pertimbangan semula. Menerusi perjanjian konsesi ('PK'), dengan tujuan menswastakan aktiviti pra-cetak, reka bentuk, penetapan jenis, percetakan, pengedaran dan pemasarannya ('aktiviti ditetapkan'), defendan ('DBP') memberikan award konsesi 12 tahun kepada Dawama. Di bawah PK, Dawama akan mengambil alih, mengendalikan, mengurus dan menyelenggara atas kos dan perbelanjaannya sendiri, aktiviti ditetapkan berhubung dengan: (a) buku teks percuma yang diberikan kepada pelajar sekolah rendah dan menengah di bawah skim 'Buku Teks Skim Pinjaman' yang disediakan. oleh Kerajaan ('BTSP'); (b) semua buku teks selain BTSP dan Tajuk Am untuk jualan terus kepada orang ramai ('pasaran terbuka') ('buku teks'); dan (c) buku dan/atau majalah yang diterbitkan oleh DBP selain daripada buku teks ('tajuk umum') ('penerbitan'). Menurut PK dan sepanjang tempoh konsesi, DBP membuat dua tempahan utama buku teks dengan Dawama, iaitu: (i) mencetak semula buku teks sedia ada ('pesanan cetak semula'); dan (ii) buku teks tajuk baharu ('pesanan tajuk baharu') ('pesanan BTSP'). Pada tahun 2011, tiada Pesanan BTSP 2012 dibuat oleh DBP. Ini berikutan kedudukan DBP bahawa Dawama berada dalam kedudukan kewangan yang kritikal dan tidak dapat menunjukkan bahawa ia mampu melaksanakan pencetakan dan pengedaran BTSP 2012 menyebabkan DBP melakukan pencetakan BTSP 2012 dengan sendirinya. Dawama mendakwa bahawa dengan gagal membuat pesanan, DBP telah melanggar PK. Begitu juga, tiada pesanan tajuk baharu 2015 dibuat oleh DBP pada 2014 kerana kedudukan DBP bahawa PK akan tamat tempoh tidak lama lagi. Dawama, sebaliknya, menghujahkan bahawa tindakan DBP memberi petunjuk kepada Dawama bahawa mereka menganggap PK sebagai berterusan. Akibat pertikaian yang timbul, rujukan kepada timbang tara telah dibuat. Permohonan Dawama di sini adalah berhubung dengan tuntutan dalam award akhir yang telah ditolak atau dinafikan oleh penimbang tara iaitu: (A) amaun RM24,932,475.11 mewakili kerugian yang timbul daripada kegagalan DBP untuk membuat Perintah BTSP 2012 dengan Dawama; (B) jumlah RM23,140,804.77 mewakili kerugian yang timbul daripada kegagalan DBP untuk membuat pesanan tajuk baharu 2015; dan (C) sebagai alternatif kepada (B) di atas, jumlah RM16,420,715.06 mewakili tuntutan kuantum meruit Dawama bagi nilai kerja dan/atau nilai tenaga kerja dan perkhidmatannya untuk aktiviti ditetapkan berhubung dengan pesanan tajuk baharu 2015. Persoalan yang dikemukakan oleh Dawama adalah: (1) sama ada tribunal terkhilaf dari segi undang-undang dengan bergantungan kepada

keputusan dalam; (I) *Kamuja Hartamas Sdn Bhd (formerly known as Aras Suasana Sdn Bhd) v Bank Kerjasama Rakyat Malaysia Bhd* [2017] 3 MLJ 668; dan (II) *Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm) ('Glory Wealth'), dalam mencapai keputusannya bahawa Dawama perlu membuktikan bahawa ia berada dalam kedudukan untuk melaksanakan kontrak pada tahun 2011 untuk mewujudkan tuntutan ganti rugi; (2) sama ada kegagalan tribunal untuk mempertimbangkan keterangan yang sebenarnya dikemukakan oleh Dawama dalam membuktikan ganti rugi tersebut terjumlah kepada pelanggaran keadilan semula jadi di pihak tribunal atau sebaliknya merupakan kekhilafan undang-undang; (3) sama ada tribunal telah mengguna pakai dengan betul prinsip yang ditetapkan dalam s 74 Akta Kontrak 1950 dalam menentukan pampasan yang perlu dibayar kepada Dawama disebabkan pelanggaran kontrak oleh DBP; (4) sama ada DBP diwajibkan dari segi undang-undang: (I) untuk terus melaksanakan kewajipannya di bawah PK atas alasan dapatan fakta oleh tribunal bahawa DBP telah di-estop daripada mendakwa bahawa kontrak tersebut telah tamat berdasarkan peredaran masa, dan (II) atas alasan tersebut bertanggungjawab untuk membayar ganti rugi kepada Dawama; (5) sama ada dalam menilai ganti rugi secara kuantum meruit, tribunal telah dihalang dalam undang-undang daripada mempertimbangkan dan/atau mengambil kira keuntungan yang akan diperolehi daripada kontrak oleh pihak yang tidak bersalah (Dawama) dalam menentukan harga pasaran dan/atau nilai kerja dan/atau perkhidmatan yang dilakukan olehnya.

Diputuskan, menolak saman pemula dengan kos:

(1) Tiada kekhilafan dalam penggunaan undang-undang oleh penimbang tara bagi menjamin campur tangan oleh mahkamah ini di bawah rujukan s 42. Tidak ada keperluan untuk mahkamah ini dalam memutuskan 'kedudukan yang betul' seperti yang didakwa oleh Dawama antara kes *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382 dan *Glory Wealth* kerana: (a) tiada konflik antara kedua-dua kes; (b) prinsip dalam *Glory Wealth* adalah konsisten dengan kes Mahkamah Agung Inggeris *Bunge SA v Nidera BV (formerly known as Nidera Handelscompagnie BV)* [2015] UKSC 43 yang mengguna pakai *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353; dan (c) prinsip-prinsip dalam *Glory Wealth* adalah konsisten dengan prinsip pampasan ganti rugi sebagaimana yang digunakan dan diterima pakai oleh mahkamah Malaysia. Walau apapun, sebarang pandangan yang bercanggah tentang perkara undang-undang tidak menimbulkan persoalan undang-undang (lihat perenggan 28–29).

(2) Cabaran s 42 tidak boleh bercampur dengan sebarang dapatan fakta. Dalam menentukan pihak mana yang bersalah, ia adalah penting untuk melihat semula asas penimbangtara mencapai mengapa beliau tidak mendapati DBP sebagai pihak yang bersalah. Daripada semakan award

tersebut, terdapat dapatan penimbang tara bahawa beliau telah menerima pengakuan seorang Dato' Norhisham, saksi bagi Dawama, bahawa pada 2011, Dawama menghadapi masalah kewangan. Ini menyebabkan Dawama tidak dapat membeli bahan-bahan yang berkaitan iaitu kertas pada tahun 2011. Akibatnya, DBP terpaksa menjalankan Pesanan aktiviti ditetapkan BTSP 2012 sendiri. Dapatan sedemikian oleh penimbang tara jelas merupakan dapatan fakta. Hujah tentang siapa yang menanggung beban membuktikan keupayaan untuk melaksanakan kontrak telah digantikan oleh dapatan fakta ini. Sekiranya Dawama telah mengakui bahawa mereka tidak dapat melaksanakan Pesanan aktiviti ditetapkan BTSP 2012, ia tidak lagi boleh mendakwa berhak mendapat sebarang bentuk pampasan akibat ketidakupayaan mereka sendiri untuk melaksanakan kontrak tersebut. Penimbang tara adalah betul dalam membuat kesimpulan dengan cara yang beliau lakukan dengan bergantung pada *Kamuja* di mana Mahkamah Rayuan menyentuh keperluan untuk pihak yang mendakwa menanggung ganti rugi untuk menunjukkan bahawa ia boleh melaksanakan bahagiannya dan dengan itu berhak mendapat ganti rugi (lihat perenggan 30–31).

(3) Kedudukan dalam undang-undang berkaitan beban dan onus pembuktian telah selesai. Ia terletak pada Dawama. Oleh kerana dakwaan Dawama bahawa ia telah mengalami kerugian dalam jumlah RM24,932,475.11 untuk Pesanan BTSP 2012, Dawama mempunyai beban serta onus pembuktian. Dalam mempertimbangkan persoalan yang dikemukakan oleh Dawama, ia tidak dapat dielakkan bagi mahkamah ini untuk kembali kepada dapatan fakta yang dicapai oleh Penimbang Tara apabila beliau membuat kesimpulan bahawa Dawama sendiri tidak dapat menunjukkan bahawa ia mampu melaksanakan bahagiannya. Dapatan ini diperoleh terutamanya daripada penilaian keterangan saksi utama Dawama, Dato' Norhisham. Oleh itu, ia bukan lagi persoalan undang-undang tulen. Dalam keadaan tersebut, persoalan (1) tidak layak sebagai persoalan yang boleh digunakan sebagai rujukan di bawah s 42 Akta tersebut (lihat perenggan 33–34 & 37).

(4) Kegagalan penimbang tara untuk mempertimbangkan keterangan seorang Datuk Luqman tidak boleh menjadi asas untuk menegaskan bahawa pelanggaran keadilan semula jadi telah berlaku. Oleh itu, persoalan (2) gagal memenuhi ambang yang diperlukan untuk sebarang pertimbangan oleh mahkamah ini (lihat perenggan 43 & 45).

(5) Persoalan (3) adalah terlalu umum dan luas. Hanya menyebut s 74 Akta Kontrak dan penggunaannya tidak mencukupi. Untuk melepasi ambang yang diperlukan, pembaca persoalan mesti dapat mengenal pasti persoalan undang-undang yang menjadi kekhilafan yang timbul daripada award tersebut. Persoalan undang-undang mesti boleh menghadapi alasan oleh penimbang tara dalam award tersebut. Tiada

alasan yang dinyatakan oleh Dawama di mana rujukan tersebut dipohon. Ia adalah kenyataan umum dan terbuka yang mana mahkamah ini tidak dapat menentukan isu atau kekhilafan yang tepat untuk ditentukan berbangkit daripada award tersebut. Oleh itu, berkenaan persoalan (3), keperluan rujukan s 42 belum dipenuhi (lihat perenggan 52 & 54–55).

(6) Tiada salah arah di pihak penimbang tara apabila beliau membuat kesimpulan bahawa Dawama tidak berhak mendapat tuntutan utama pesanan tajuk baharu 2015. Terdapat dapagtan fakta yang jelas oleh penimbang tara bahawa beliau mendapati Dawama tidak berhak menerima pesanan tajuk baharu 2015. Dapatan penimbang tara berhubung dengan Pesanan Cetakan Semula 2015 tidak meliputi pesanan tajuk baharu 2015. Oleh itu, ia adalah jelas kepada penimbang tara daripada kronologi peristiwa dan minit mesyuarat bahawa ia adalah menjadi hasrat pihak-pihak bahawa apabila tamat tempoh PK, DBP akan mengambil alih aktiviti ditetapkan berhubung dengan pesanan tajuk baharu 2015. Tiada percanggahan dalam dapatan yang dibuat oleh penimbang tara. Kecelaruan dalam dapatan penimbang tara, sekiranya ada, tidak serta-merta memberikan hak kepada Dawama untuk mencabar award muktamad. Ini kerana kekhilafan fakta tidak terjumlah kepada persoalan undang-undang (lihat perenggan 61–62, 67 & 69).

(7) Ia adalah jelas apa yang Dawama mohon mahkamah ini menjalankan pemeriksaan semula fakta yang dilakukan oleh penimbang tara. Ia tidak boleh menjadi percubaan pintu belakang untuk mendesak mahkamah ini menyemak semula dapatan penimbang tara. Perbezaan antara rujukan s 42 dan rayuan adalah sangat baik. Dalam menilai persoalan (4), sudah pasti mahkamah ini memerlukan mahkamah menyemak semula fakta yang serupa dengan rayuan. Tindakan sedemikian tidak boleh dilakukan oleh mahkamah ini. Kesimpulannya, persoalan (4) ialah persoalan fakta yang telah dijadikan sebagai persoalan undang-undang. Ia tidak patut dipertimbangkan (lihat perenggan 71–72).

(8) Penimbang tara tidak terkhilaf dari segi undang-undang apabila beliau berpendapat bahawa Dawama tidak berhak menerima tuntutan RM16,420,715.06 untuk kuantum meruit ('jumlah kuantum meruit'). Keengganan penimbang tara untuk membenarkan tuntutan untuk kuantum meruit bermula pada fakta bahawa terdapat kegagalan oleh Dawama untuk membuktikan tuntutan tersebut. Dalam menolak tuntutan kuantum meruit, penimbang tara berpendapat bahawa Dawama telah mengambil kira keuntungan keseluruhan pesanan tajuk baharu 2015 semasa mengira jumlah kuantum meruit. Pengiraan tidak dapat berdasarkan keseluruhan nilai kontrak yang Dawama jangkakan akan perolehi. Kos yang ditanggung mesti ditunjukkan dan dibuktikan secukupnya kepada tribunal berdasarkan kerja sebenar yang dilakukan. Oleh itu, persoalan (5) yang dikemukakan dalam OS ini telah ditolak

(lihat perenggan 75, 78, 88–89, 94–95 & 99).

(9) Tiada sebab untuk mengubah keputusan penimbang tara. Juga tiada alasan untuk mahkamah menghantar semula perkara ini kepada penimbang tara. Award muktamad telah ditulis dengan sistematik dan jelas. Ia perlu diambil dalam konteks yang betul dan apa-apa percubaan untuk mencabar dan mengubah anugerah tersebut dengan niat untuk mencari kekhilafan tidak dapat disokong (lihat perenggan 100).]

Cases referred to

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Sopov v Kane Constructions Pty Ltd (No 2) (2009) 24 VR 510, SC (refd)
Spatial Ventures Sdn Bhd v Twintech Holdings Sdn Bhd [2014] 8 MLJ 38, HC (refd)
Tanjung Teras Sdn Bhd v Kerajaan Malaysia [2015] MLJU 2161; [2015] 9 CLJ 1002, CA (refd)
Tridant Engineering (M) Sdn Bhd v Ssangyong Engineering and Construction Co Ltd [2016] 6 MLJ 166; [2017] 2 CLJ 393, CA (refd)
WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd [2018] SGHC 28, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 37, 42, 42(2)
Arbitration Act [SG]
Contracts Act 1950 ss 71, 74
Rules of Court 2012 O 69 rr 2(1)(h), 4(b), (c), 6

Alan Adrian Gomez (Michael Yap Chih Hong with him) (Tommy Thomas) for the plaintiff.
Siva Kumar Kanagasabai (Corrinne Chin with him) (Skrine) for the defendant.

Ahmad Fairuz J:

INTRODUCTION

[1] The plaintiff ('Dawama') sought to invoke s 42 of the Arbitration Act 2005 ('the Act') and O 69 rr 2(1)(h), 4(b) and/or (c) and 6 of the Rules of Court 2012 for this court to determine five questions of law arising from the final award dated 12 February 2018. Dawama also sought to vary part of the final award or in the alternative, to remit that part of the final award to the learned arbitrator for reconsideration.

[2] This court dismissed the application as it did not find any merits to the application and affirmed the findings of the learned arbitrator.

A BACKGROUND

[3] The background facts have been set out in the award as well as the submissions by both Dawama and the defendant ('DBP'). This court adopts the salient facts as elaborated below.

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[4] Vide a concession agreement dated 19 June 2002 ('the CA'), with a view of privatising its pre-press, design, type-setting, printing, distribution and marketing activities ('prescribed activities'), DBP awarded a 12 year concession to Dawama. Under the agreement, from 1 September 2002 to 31 August 2014, Dawama would take over, operate, manage and maintain at its own costs and expense, the prescribed activities in relation to:

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(a) free textbooks provided to primary and secondary school students under 'Buku Teks Skim Pinjaman' scheme set up by government ('BTSP');

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(b) all textbooks other than BTSP and the general titles for direct sale to the public ('open market') (BTSP and open market to be collectively referred to as 'textbooks'); and

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(c) books and/or magazines published by DBP other than the textbooks ('general titles'),

in hard copy, soft copy, diskettes, CD-ROM, DVD software, internet and other similar medkJm (collectively referred to as 'the publications').

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[5] Pursuant to the CA and throughout the concession period, DBP placed two main orders of textbooks with Dawama. The orders are as follows:

(a) reprinting of existing textbooks ('reprint orders'); and

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(b) new textbook titles ('new title orders').

(both orders will be collectively referred to as 'BTSP orders')

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[6] In 2011, no 2012 BTSP orders placed by DBP. This is due to DBP's position that Dawama was in a critical financial position and was unable to demonstrate that it was capable of carrying out the printing and distribution of 2012 BTSP resulting in DBP undertook the printing of 2012 BTSP by itself. Dawama claimed that by failing to place the orders, DBP had breached the CA.

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[7] Likewise, no 2015 new title orders placed by DBP in 2014 due to DBP's position that the CA would expire on 31 August 2014. Dawama on the other hand submitted that DBP's conducts gave indication to Dawama that they regarded the CA as continuing.

[8] A dispute arose between DBP and Dawama. Pursuant to Clause of the CA, a reference to arbitration was made. The learned arbitrator issued the final award on 12 February 2018.

HEADS OF CHALLENGE

[9] Dawama's application is in relation to the following claims in the final award which have been dismissed or denied by the learned arbitrator:

(i) the sum of RM24,932,475.11 representing the loss arising from DBP's failure to place the 2012 BTSP orders with Dawama;

(ii) the sum of RM23,140,804.77 representing the loss arising from DBP's failure to place the 2015 new title orders; and

(iii) in the alternative to (ii) above, the sum of RM16,420,715.06 representing Dawama's quantum meruit claim for the value of works and/or worth of its labour and services for the prescribed activities in relation to the 2015 new title orders.

Principle of law on s 42 challenge

[10] At the onset, it is useful to recap the principle which governs a s 42 challenge. In *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693, the Federal Court outlined the following principles to be observed by court when entertaining a s 42 application. It held as follows:

> Test Under s 42
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> [117] Under s 42(1) any party may refer to the High Court, 'any question of law arising out of an award'. And under s 42(1A), 'The High Court shall dismiss a reference made under sub-s (1) unless the question of law substantially affects the rights of one or more of the parties'. The question of law must not only arise out of the award, but must substantially affect the rights of one or more of the parties. Short of one and the reference shall be dismissed.
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> [118] An award might or might not be perverse, unconscionable, unreasonable, and the like. But it only matters whether there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. Under s 42, that is the only ground for the court to intervene. Perverse, unconscionable, unreasonable, and the like are not tests for the setting aside of an award.
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> ...
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> [150] 'The question of law must be one of law and not fact' (The Arbitration Act 2005 at p 198). 'An error of fact alone is insufficient' (*Dept of Education v Azmitia* [2015] WASCA 246 per Mazza JA). But there is no universal definition of 'question of law'. Nonetheless, from our survey of the authorities, we would conclude that

A one of the following, which is not an exhaustive list, would meet the paradigm of 'any question of law' in s 42:

(a) a question of law in relation to matters falling within (2) of Mustill J's three-stage test;

B (b) a question as to whether the decision of the tribunal was wrong (*The Chrysalis*);

(c) a question as to whether there was an error of law, and not an error of fact (*Micoperi*): error of law in the sense of an erroneous application of law;

C (d) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal has given aptither (*MRI Trading*);

(e) a question as to the correctness of the law applied;

(f) a question as to the correctness of the tests applied (*Canada v Southam*);

D (g) a question concerning the legal effect to be given to an undisputed set offacts (*Carrier Lumber*);

(h) a question as to whether the tribunal has jurisdiction to determine a particular matter (*Premiums Brands*): this may also come under s 37 of the AA 2005; and

E (i) a question of construction of a document (*Intelek*).

(See also *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617 and *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98; [2013] 8 CLJ 655).

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[11] Types of questions must be questions that arise out of the award and not questions that arose during the arbitration proceedings (see *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* [2009] MLJU 1697; [2009] 1 LNS 1766, *Exceljade Sdn Bhd v Bauer (M) Sdn Bhd* [2013] MLJU 1202; [2013] 1 LNS 1470). The questions under s 42 cannot be mixed questions of fact and law. A factual question cannot be guised or dressed up as a question of law (see *Geogas SA v Trammo Gas Ltd; The Baleares* [1991] 1 Lloyd's Rep 349). The rational for such a prohibition stems from the basic notion that the arbitrator is the master of facts (see *Chain Cycle Sdn Bhd v Kerajaan Malaysia* [2016] 1 MLJ 681; [2016] 1 CLJ 218).

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[12] So long as the arbitrator considered the issue raised and assessed it to the facts of the case, his finding ought not be disturbed or reversed even of the outcome of the award was perverse (see *Far East Holdings*). Such is the deference. given to party autonomy which is meant to respect the common stand of parties in surrendering their dispute to an arbitral tribunal.

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[13] The consequence of placing such approbation must mean that any

review of an award is restricted. If judicial intervention is allowed liberally, party autonomy would be ineffectual and the finality and independence of the arbitral award is not guaranteed.

[14] This court would be failing in its duty if failed to remind itself of the recent Federal Court decision in *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1; [2020] 9 CLJ 466 where in no undertrain terms, the principle of minimal interference by the court was reemphasised. Abdul Rahman Sebli FCJ summarised the position in law as follows:

> Section 8 of the Act enshrines the principle of minimal interference by the court, which is an ingrained aspect of the United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration: See *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617 CA which was cited with approval by this court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693; [2018] 1 CLJ 693.

[15] Prior to *Pancaran Prima*, another Federal Court in the case of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413; [2019] 1 CLJ 1 also ruled on the effect of minimal intervention and referred to the effect of ss 8, 9, 37 and 42 of the Act. It held as follows:

> The effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice (see: *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2011] MLJU 1537; [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43). In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined. (Emphasis added)

[16] The questions posed by Dawama will be dealt with in the following manner.

Question 1

Having regard to the determination by the Arbitral Tribunal that the contract in question, namely, the concession agreement, had neither been suspended or terminated in 2011, whether the Tribunal erred in law in relying upon the decisions in:

A (a) *Kamuja Hartamas Sdn Bhd (formerly known as Aras Suasana Sdn Bhd) v Bank Kerjasama Rakyat Malaysia Bhd* [2017] 3 MLJ 668; [2017] 1 LNS 134; and

(b) *Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm), in reaching its finding that Dawama had to prove that it was *in a position to perform the contract in 2011 in order to establish a claim in damages.*

[17] The complaint relates to the arbirator's reliance on the case of *Kamuja.* Counsel for Dawama argued that it was erroneous for the arbitrator to rule that it was the duty of Dawama to show that it could perform the contract. This, according to counsel for Dawama, was contrary to the provisions of s 74 of the Contracts Act 1950 as under the said section, there was only two requirements, ie: (i) there is a breach of contract; and (ii) the innocent party has suffered loss or damage caused to him by the breach. Therefore, the arbitrator was in error for imposing an additional duty on Dawama in respect of the claim for the 2012 BTSP.

[18] On the applicable authorities, it was contended that the reliance on *Kamuja* which agreed with *Glory Wealth* was also erroneous. Instead, the English authority that ought to be followed was that of *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382. *Glory Wealth* was shown to this court to be bad law. It was a decision of a court of first instance and was not appealed upon. There were also commentaries in England which criticised the decision in *Glory Wealth.* Counsel invited this court to consider the views of the eminent jurist who made the said comments in determining the said question of law.

[19] The correct law to apply is instead found in the decision of *Berger* where Lord Diplock ruled that the onus is on the guilty party (the party that breached the contract) to prove that the innocent party is not able to perform his part of the bargain in order to deny the claim for damages. It is clear that the guilty party according to Dawama is DBP. The innocent party being Dawama. Thus, the duty was on DBP to prove that Dawama was not able to perform its bargain and not the other way around.

[20] DBP however, contended that *Glory Wealth* was correctly decided upon by the English Court. This is because, *Glory Wealth* relied on the decision of *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353.

[21] In *Golden Victory,* the parties entered into a seven year charter party on July 1998. On December 2001, the defendant repudiated the contract and the claimant accepted the repudiation the same year. The defendant argued that they could not recover damages beyond March 2003, the date of the Second

Gulf War, relying on cl 33 of their contract which gave the right to cancel the contract in the event of outbreak of war. The issue in this case was when exactly damages were to be assessed. The majority in the House of Lords gave judgment for the defendant, favouring a strict reading of the compensatory principle, namely that the injured party should be placed in the same position as if the contract had been performed. This meant that the House of Lords was of the view that subsequent events ought to be taken into account when assessing damages:

> 36 The same would, in my opinion, be true of any anticipatory breach the acceptance of which had terminated an executory contract. *The contractual benefit for the loss of which the victim of the breach can seek compensation cannot escape the uncertainties of the future. If, at the time the assessment of damages takes place, there were nothing to suggest that the expected benefit of the executory contract would not, if the contract had remained on foot, have duly accrued, then the quantum of damages would be unaffected by uncertainties that would be no more than conceptual. If there were a real possibility that an event would happen terminating the contract, or in some way reducing the contractual benefit to which the damages claimant would, if the contract had remained on foot, have become entitled, then the quantum of damages might need, in order to reflect the extent of the chance that that possibility might materialise, to be reduced proportionately.* The lodestar is that the damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more. (Emphasis added.)

[22] The *Golden Victory* was reaffirmed in the English Supreme Court case of *Bunge SA v Nidera BV (formerly known as Nidera Handelscompagnie BV)* [2015] UKSC 43. In *Bunge SA,* Lord Sumption reaffirmed the approach of the majority in *Golden Victory* in stating that the 'compensatory' principle was a 'fundamental principle of the common law of damages'. While certainty was important, it could not justify awarding substantial damages to a party who had not actually suffered any damage. The relevant passage of the judgment is as follows:

> [23] The principle upheld in *The Golden Victory* has come in for a certain amount of academic criticism and judicial doubt. To my mind both the criticism and the doubt are unjustified.
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> ...
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> *There is no principled reason why, in order to determine the value of the contractual performance which has been lost by the repudiation, one should not consider what would have happened if the repudiation had not occurred. On the contrary, this seems to be fundamental to any assessment of damages designed to compensate the injured party for the consequences of the breach. If the contract had not been repudiated, it would* have been lawfully cancellable. If it was lawfully cancellable, the have been entitled to avail himself of that right regardless of his motive. question is whether he would in fact have done so, a question which in practice would probably have been determined by his financial interest. *Commercial certainty is undoubtedly important, although its significance will inevitably vary from one contract to another. But it can*

rarely be thought to justify an award of substantial damages to someone who has not suffered any ... (Emphasis added.)

[23] The aforesaid hypothetical exercise referred to in *Glory Wealth* was also carried out by the Malaysian Court of Appeal in *Kamuja* when the court analysed the evidence and noted that the first defendant was in no position to complete the project in the first place as a relevant factor in assessing damages:

> [27] In our view whether or not there was a challenge posed on the report by DW1, *the first defendant would have to first establish what are the damages resulting from the wrongful termination.* For example it cannot be assumed that the wrongful termination per se had caused the project to scuttle. *There is evidence as submitted by learned counsel for the plaintiff that the first defendant was in no financial position to complete the project which required RM45m to complete in the first place.* Even if the plaintiff had disbursed the two tranches it would be for only RM9,846,000 which would not suffice to complete a RM45m project. *We do not agree therefore that the damages claimed by the first defendant should simply be based on the project amount after dedudlllg the profit to the plaintiff perse, as loss suffered by the first defendant.* (Emphasis added.)

Analysis

[24] This court will now analyse the first question posed by Dawama.

[25] From the tenor of the submissions advanced by Dawama, it was clearly attacking the arbitrator's application of the principles found in *Kamuja.* It behoves this court to consider the arguments of law advanced by the parties to ascertain if there was indeed a misapplication of the law as alleged by Dawama.

[26] It is the considered view of this court that *Glory Wealth* considered *Berger.* However, it rejected the application of *Berger* as *Berger* did not touch on the compensatory principles in assessing damages.

[27] The court in *Glory Wealth* explained how the decision in *Berger* is not relevant to the point which the court must determine:

> [62] The reasoning of Lord Diplock in *Gill & Duffus v Berger* does therefore support Sir Guenter Treitel's opinion. However, *Gill & Duffus v Berger* was not a case where the award of damages placed the sellers in a better position than they would have been in had there been no repudiatory breach by the buyers. For, in circumstances where the 445 tonnes had been certified as conforming with the contract and where there was no finding that a similar certificate would not have been issued in relation to the balance of 55 tonnes the buvers were unable to show that there would have been a breach by the sellers which (had the contract been subsisting) would have entitled the buvers to reject the goods themselves. No reference was therefore made to the compensatory principle underlying the assessment of damages.

[28] Clearly, this court upon reading the cases cited by both parties finds that the decisions were arrived at based on their own peculiar facts. More importantly, this court does not find the cases to be in conflict with each other. There was no error in the applicability of the laws by the arbitrator to warrant an intervention by this court under a s 42 reference. It can be concluded that there is no need for this court to decide on a 'correct position' as alleged by Dawama between the cases of *Berger* and *Glory Wealth* for the following reasons:

(a) there is no conflict between both cases;

(b) the principles in *Glory Wealth* is consistent with the English Supreme Court case of *Bunge SA* which accepted *Golden Victory;* and

(c) the principles in *Glory Wealth* are consistent with the compensatory principle of damages as applied and adopted by the Malaysian courts.

A point of law in controversy cannot be a question of law

[29] Be that as it may, any conflicting view on points of law do not give rise to a question of law. The Federal Court in *Far East* was clear in this aspect. It held as follows:

> [152] Section 42 allows any question of law arising from the award. 'Any question of law' is wider than a question of law'. Since so, it would seem that s 42 contemplates a less narrow interpretation of question of law'. Unless opted in, s 42 only applies to domestic arbitration. A less narrow interpretation of question of law' in s 42, as we might have given it, would not widen court intervention in international arbitration. *But 'a point of law in controversy which has to be resolved after opposing views and arguments have been considered' is not a 'question of law' within the meaning of s 42. There would surely be 'a point of law in controversy' in every case. If a point of law in controversy were a question of law, then there would be a 'question of law' arising in every award. And that, with respect, could not be right.* (Emphasis added)

Finding of fact by the arbitrator

[30] It is also the position in law that a s 42 challenge cannot be one that is mixed with any finding of facts. In determining who the guilty party was, it is incumbent for this court to relook at the basis on which the arbitrator arrived at as to why he did not find DBP as the guilty party. From a perusal of the award, there was a finding by the arbitrator that he took the admission of Dato' Norhisham, the witness for Dawama, that in 2011, Dawama was in financial difficulties. This resulted in Dawama being unable to purchase the relevant materials namely paper in 2011. As a result of which, DBP had to undertake the BTSP 2012 orders prescribed activities themselves. Such a finding by the arbitrator is clearly a finding of facts.

[31] The argument as to who bears the burden of proving the ability to perform the contract has been displaced by this finding of fact. If Dawama themselves have admitted that they were not able to perform the BTSP 2012 orders prescribed activities, no longer can it claim to be entitled to any form of compensation as a result of their own inability to perform the contract. The arbitrator was correct at concluding in the manner he did by relying on *Kamuja* where the Court of Appeal touched on the need for the party claiming to be suffering damages to show that it could perform its part of the bargain and thus entitled to damages. This is in line with *Glory Wealth* and *Berger* cases discussed above which also emphasised the compensatory principles when assessing damages.

[32] It follows that the remark '... Here it is for Dawama to prove the same' by the arbitrator cannot be seen as an error of law. It was a deduction made by the arbitrator after a factual and legal assessment.

[33] Be that as it may, the position in law with regards to burden of proof and onus of proof is settled. It lies with Dawama. In *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697, it was held that:

> [56] ... a plaintiff has both the burden of proof as well as the initial onus of proof ...
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> [57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et inoumbit probation qui decit, non qui negat*, *Actori incibit* probation ... The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect the court will not assist him'.

[34] As it is Dawama's claim that it has suffered losses in the sum of RM24,932,475. 11 for the 2012 BTSP orders, Dawama has the burden as well as the onus of proof.

[35] In order to satisfy the burden of proof, Dawama has to prove both the fact and the amount of damages before it can recover the same. In the Federal Court case of *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, in dealing with proof of damages, the court observed as follows:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR

177 at 178:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost: I ask you to give me these damages'. They have to prove it. (Emphasis added.)

[36] The case of *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 (CA) relied on by Dawama is distinguishable. *CCC Films* involved wasted expenditure while Dawama's claim for the 2012 BTSP orders is based on its alleged loss of profits. Unlike a claim for loss of profit, in the case of 'wasted expenditure' there is no hypothetical exercise to be conducted because we are looking at actual amounts incurred.

[37] In considering the question posed by Dawama, it is inevitable for this court to revert to the finding of facts arrived at by the arbitrator when he concluded that Dawama itself was unable to show that it was able to perform its part of the bargain. This finding was arrived primarily from the assessment of evidence of Dawama's main witness, Dato' Norhisham. As such, it no longer was a question of pure law. In the circumstances, question 1 does not qualify as a question that can be used as reference under s 42 of the Act.

Question 2

In any event, whether the Tribunal's failure to consider evidence actually led by Dawama in proving such damage amounts to a breach of natural justice on the part of the Tribunal or otherwise constitutes an error of law.

[38] This was initially abandoned by Dawama in the main submissions before this court. However, it was submitted by Dawama in the submission in reply that they were not letting the second question go and instead argued that there was breach of natural justice as a result of the arbitrator failing to consider evidence actually led by Dawama during the arbitration proceedings.

[39] Emphasis was placed on the failure of the arbitrator to consider the evidence of Datuk Luqman, the first witness of Dawama. He was the person who was running Dawama until it fell into financial difficulty. Dawama argued that the arbitrator fell into error when he relied on the evidence of Dato' Norhisham, the white knight who came in to save the company. The disregard by the arbitrator of the evidence of Datuk Luqman according to Dawama, was a breach of natural justice which also constitutes an error of law.

[40] Dawama relied on the Singapore case of *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28. It was argued that the

A *WCS Engineering* was consistent with the decision in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697 where the Court of Appeal draws a distinction between the ambit of a s 37 application which 'largely deals with issues relating to the award making process' and a s 42 reference which 'has everything to do with the award per se and an error of law B on the fact of record which substantially affects the right of one or more of the parties'. Dawama argued that the breach occurred may or may not occasion in an error of law.

C **[41]** DBP argued that the manner in which the question was formulated by itself does not merit any consideration as the said question failed to demonstrate the error of law that was complained of.

Analysis

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[42] It is trite that when construing any issue of a breach of natural justice, the interpretation is strict (see Mary Lim JCA (now FCJ) decision in *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2018] 3 MLJ 608; [2018] 8 CLJ 291). Even if there was a breach, it may not be necessarily be upheld by the court that could E vitiate an award.

[43] The failure of the arbitrator to consider the evidence of Datuk Luqman cannot be the foundation to insist that a breach of natural justice had occasioned. The reliance of Dawama on the case of *WCS Engineering* is of no F value. In the said case, the court was confronted with a leave application under the Singapore Arbitration Act. The court ruled that failure to consider the facts presented during arbitration may or may not amount to a breach of natural justice. It did not affirmatively rule that it does amount to a breach of natural justice. Similarly, the bench in *Petronas Penapisan* was considering what G amounts to a question of law that affects the rights of parties under s 42. It was not per se a pronouncement that a failure to consider a fact presented at the tribunal may tantamount to a breach of natural justice.

[44] The ingenuity of arguments by counsel must be carefully considered by H the court. Reference is made to the decision of *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 where Sundaresh Menon CJ reminded the common arguments that are usually advanced when contending a breach of natural justice. His Lordship held as follows:

I 39. *In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the real nature of the complaint.*

Among the arguments commonly raised in support of breach of natural justice challenges are these:

(a) that the arbitral tribunal misunderstood the case presented and so did not apply its mind to the actual case of the aggrieved party;

(b) that the arbitral tribunal did not mention the arguments raised by the aggrieved party and so must have failed to consider the latter's actual case; and

(c) that the arbitral must have overlooked a part of the aggrieved party's case because it did not engage with the merits of that part of the latter's case. (Emphasis added.)

[45] Given the above, question 2 fails to meet the required threshold for any consideration by this court.

Question 3

Whether the Tribunal had correctly applied the principles laid down in the Contracts Act 1950, s 74, in determining compensation payable to Dawama by reason of breaches of contract by DBP

[46] It is the view of this court that there is a failure on the part of Dawama to identify the question of law to be determined and state the grounds on which the reference is sought. The question posed is a general question.

[47] A reference to court on a question of law under s 42 is not provided under the Model Law and is no longer in line with most jurisdictions. In most of the jurisdictions that do not provide a reference on a point of law but allows an avenue of appeal to be taken on appoint of law (such as in New Zealand, England and Singapore), leave must be obtained before an appeal is to be taken even on. This is to filter out frivolous appeals which has no likelihood of success.

[48] However, no such filter mechanism is contained in the Act. It therefore confers a party a right to a hearing on the merits of the party applying, subject to passing the applicable threshold of whether there are questions of law arising out of the award. The threshold does not raise issues such as the strength of the argument or the importance of the point as in most of the jurisdictions with the 'filter system'. There is however a threshold that is pegged on two qualifiers namely: (a) is there a point of law? and if so, (b) is it one arising out of an award (see *Arbitration Act 2005*, Sundarajoo and Davidson (Sweet and Maxwell)).

[49] On the first test of whether there is a question of law and not fact, it is pertinent to sieve out if the said question involves a question of fact. If there is

a question of fact involved, the reference cannot be one that is deemed to be a question of law. This is primarily because the arbitrator is the master of facts (*Geogas SA v Trammo Gas Ltd; The Baleares* [1991] 1 Lloyd's Rep 349; *Far East*).

[50] The second test is whether the question of law arises out of an award. The development of law as to what amounts to 'arising out of an award' has been discussed in many cases. This court will not embark on the exercise of what amount to a question of law 'arising out of an award'. It is clear that the question of law cannot arise out of the arbitration itself. On the standard to be applied to the applicable threshold, this court adopts the standard applied by Sundrajoo and Davidson, where they concluded that the 'the fact that the Malaysian Act has omitted the leave requirements makes it all the more necessary for a strict approach to be taken'.

[51] It is therefore axiomatic that this court is entitled to strictly assess the question posed to ascertain if it has passed the threshold discussed above. The court cannot be forced to analyse and ascertain which part of the award is being questioned merely because a question has been posed.

[52] It is the finding of this court that on a stand-alone basis, the question is overly general and broad. The mere mention of s 74 of the Contracts Act and its applicability is insufficient. To pass the requisite threshold, a reader of the question must be able to identify the question of law that fell into error arising out of the award. Put it in another way, the question of law must be able to confront the reasoning by the arbitrator in the award.

[53] An added threshold to be met is the provision under s 42(2) of the Act itself where the requirement of needing to state the grounds in which the reference is sought. Section 42(2) is reproduced for ease of reference and reads as follows:

> (2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

[54] There are no grounds stated by Dawama on which the reference is sought. It is a general and open statement which this court is unable to determine the exact issue or error to be determined arising from the award. If at all this is in the parlance of a leave application for an appeal, there is a failure to identify the error of law arising from the final award of the arbitrator.

[55] Therefore, in so far as question 3 is concerned, this court is of the view that requisites of a s 42 reference have not been met.

2015 orders

Question 4

Whether DBP is legally obliged:

(a) to continue performing its obligation under the concession agreement by reason of a finding of fact by the Tribunal that DBP is estopped from claiming that the contract had expired through effluxion of time; and

(b) by reason thereof, is liable to pay damages to Dawama.

[56] Dawama argued that the arbitrator misdirected himself in law when he held that his findings in relation to estoppel was limited to the expiry of the CA in relation to the 2015 reprint orders. That would in other words mean that as at 1 September 2014, the CA expired insofar as the 2015 new title orders are concerned, but not for the 2015 reprint orders.

[57] It was argued that such a finding cannot be right and the tribunal had re-written a new contract between Dawama and DBP — one which has a different expiry period for different BTSP orders.

[58] The paragraph which Dawama claims to be the root of the misdirection by the arbitrator is found in para 486 of the final award. It reads as follows:

> 486. On the issue of whether DBP is obliged to place the 2015 new title orders, Dawama contends that DBP is so obliged because it caried out other prescribed activities right up to November 2014. Dawama also stresses that DBP in instructing Dawama to conduct pre-press works since 2013 had represented, inter alia, that it would place the 2015 new title orders with Dawama.

[59] DBP argued that the question is not a question of law which fulfils the requirements of a s 42 reference. Instead it is a question of pure fact as Dawama was challenging the findings of facts made by the arbitrator under a different head of claim (reprint orders) in a different context in the final award.

Analysis

[60] It is at the onset important to restate the issues in dispute. There are two distinct heads of claim being made by Dawama where orders are concerned. Firstly, there is the 2015 reprint orders. Secondly, there is the primary claim of the 2015 new title orders.

[61] This court is of the view that there is no misdirection on the part of the arbitrator when he concluded that Dawama was not entitled to the primary claim of the 2015 new title orders. The arbitrator's reasoning can be found at

paras 486–489 of the final award:

> 486. On the issue of whether DBP is obliged to place the 2015 new title orders, Dawama contends that DBP is so obliged because it caried out other prescribed activities right up to November 2014. Dawama also stresses that DBP in instructing Dawama to conduct pre-press works since 2013 had represented, inter alia, that it would place the 2015 new title orders with Dawama.
>
> 487. I am unable to accept Dawama's arguments on this issue as the prescribed activities that Dawama claims it had performed up to November 2014 ie after the expiry of the Concession Agreement, was not in respect of the 2015 New Title Orders. The works which were carried out by Dawama after the expiry of the Concession Agreement was pursuant to the express and specific instruction contained in the letter of 26 June 2014 requiring Dawama to deliver the Reprint Orders in some states in Malaysia on 24 September 2014. There was also thtl injunction which was obtained on the 28 August 2015 together with the emails instructing or requesting Dawama to replace the damaged books right up to 5 November 2014.
>
> 488. It is pertinent to note that the said activities or the prescribed activities were carried out based on express and specific instructions by DBP. The said letter of 26 June 2014, the said injunction and the emails right up to 5 November 2014 which was sent to Cik Shini cannot be taken to mean that the entire Concession Agreement was extended.
>
> 489. Further, the carrying out of certain works for the 2015 Reprint Orders prior to 31 August 2014 does not entitle Dawama to continue with those works or entitle Dawama to the 2015 New Title Orders post 31 August 2014. The said works comes to an end on 31 August 2014.

[62] To this court, there was a clear finding of fact by the arbitrator that he found Dawama not being entitled to the 2015 new title orders.

[63] The purported misdirection of the arbitrator as alleged by Dawama lies in para 403 where the arbitrator mentions the phrase 'DBP is now estopped'. The said paragraph is reproduced as follows:

> 403. DBP is now estopped from relying on the strict terms of the Concession Agreement and maintain its claim that the Concession Agreement had expired on 31 August 2014. DBP is now obliged to pay Dawama for the said prescribed activities undertaken after 31 August 2014. What remains now to be considered is the amount that was conc8ded by DBP and the total amount payable to Dawama under this head.

[64] This court finds that there is no misdirection or conflicting finding made by the arbitrator. The arbitrator's findings in relation to the 2015 reprint orders did not extend to the 2015 new title orders. Period.

[65] This was specifically addressed by the arbitrator at para 487 where he stated:

(a) that 'the works which were carried out by Dawama after the expiry of the concession agreement was pursuant to the express and specific instruction contained in the letter of 26 June 2014 requiring Dawama to deliver the reprint orders in some states in Malaysia on 24 September 2014. There was also the injunction which was obtained on the 28 August 2015 together with the emails instructing or requesting Dawama to replace the damaged books right up to 5 November 2014' (there was no such instructions in relation to the BTB);

(b) that 'It is pertinent to note that the said activities or the prescribed activities were carried out based on express and specific instructions by DBP. The said letter of 26 June 2014, the said injunction and the emails right up to 5 November 2014 which was sent to a Cik Shina cannot be taken to mean that the entire CA was extended'; and

(c) 'Further, the carrying out of certain works for the 2015 reprint orders prior to 31 August 2014 does nut entitle Dawama to continue with those works or entitle Dawama to the 2015 new titled orders post 31 August 2014. The said works come to an end on 31 August 2014'.

[66] The following facts found in the affidavits of DBP which the arbitrator took into account are as follows:

(a) the CA was due to expire on 31 August 2014. DBP and Dawama held meetings on 4 February 2014, 6 February 2014, 18 February 2014, 11 March 2014, 24 April 2014, 4 June 2014, 1 July 2014 and 10 July 2014 to discuss the handing over the prescribed activities after the expiration of the CA;

(b) by way of a letter dated 24 June 2014, the Government's Chief Secretary informed Dawama of the decision made by the Cabinet at its meeting on 28 May 2014 that theCA would not be extended and it reminded Dawama to take the requisite steps in relation to the expiration of the CA;

(c) before the expiry of theCA, at a meeting on 11 August 2014:

  (i) it was agreed that all pre-press work at various stages for the 2015 new title orders should be handed over to DBP before 1 September 2014; and

  (ii) Dawama proposed that DBP and Dawama prepare their own formula for the calculation of costs for the pre-press work done for the 2015 new title orders until 31 August 2014 and Dawama is to fix a date to conduct negotiations.

[67] Therefore, it was clear to the arbitrator from the chronology of events and minutes of meetings that it was the intention of the parties that on the expiry of the CA, DBP will take over the prescribed activities in relation to the 2015 new title orders.

[68] The arbitrator found as a fact at para 493 of the final award that 'is clear from the said minutes that as at 11 August 2014, Dawama was certain as to the handing over of the said works before 1 September 2014. There is no doubt as to the understanding and intention of Dawama'.

[69] To the mind of this court, there are no inconsistencies in the finding arrived by the arbitrator. Inconsistencies in the findings of the arbitrator even if there were, does not immediately entitle Dawama to challenge the final award. This is because an error of fact does not amount to a question of law (see *Far East Holdings*).

[70] The finding of facts by the arbitrator as the master of facts, cannot be easily set aside and replaced, no matter how perverse the findings are (see *Far East Holdings* and *Jan De Nul*).

[71] It is clear what Dawama was seeking this court to carry out is a re-examination of the facts the arbitrator undertook. It cannot be a backdoor attempt to urge this court to revisit the findings of the arbitrator. The distinction between a s 42 reference and an appeal is a fine one (see *Far East Holdings*). Given the fine line, this court rules that in assessing question 4, it inevitably wilt require this court to revisit the facts once again which is akin to an appeal. Such an exercise cannot be undertaken by this court.

[72] In conclusion, this court rules that question 4 is a question of fact which has been dressed up as a question of law. It merits no consideration (see *Tridant Engineering (M) Sdn Bhd v Ssangyong Engineering and Construction Co Ltd* [2016] 6 MLJ 166; [2017] 2 CLJ 393).

Question 5

Whether in assessing damages on a quantum meruit basis, the Tribunal is precluded in law from considering and/or taking into account the profit to be gained from the contract by the innocent party (Dawama) in determining the market price and/or value of works and/or services done by it.

[73] Dawama argued that the arbitrator fell into error when he denied Dawama the alternative claim of quantum meruit. In particular, Dawama argued that it was wrong for the arbitrator to deny the claim by stating that the

sum claimed contain elements of profits and therefore disentitling them the damages sought.

[74] DBP on the other hand argued that the question posed ought to be dismissed as the proposition it promotes is wrong in law namely it seeks this court's endorsement that: (i) loss of profit under a contract can be used to the determine the quantum meruit value based on the anticipated time frame for completion as opposed to the actual value of work done; and (ii) in quantum meruit, a claimant may both claim the estimated price of work done as well as the loss of profit if the CA had continued and they received the full profit from the BTB 2015.

Analysis

[75] To the mind of this court, the arbitrator did not err in law when he opined that Dawama was not entitled to the RM16,420,715.06 claim for quantum meruit ('the purported quantum meruit sum').

[76] The arbitrator's reasoning was premised on the failure by Dawama to prove the purported quantum meruit sum. He did not reject the entire claim by Dawama with regard to work or expenses that was carried out and costs proven to have been incurred by Dawama.

[77] This is evident at para 496 of the final award where he allowed a sum of RM5,349,258 as costs incurred by Dawama in the run up to them carrying out the work 2015 new title orders. It was clear that he accepted the claim as it was supported by documents and evidence sufficient to prove that the said amount were incurred.

[78] His refusal to allow the claim for the purported quantum meruit sum stems from the fact that there was failure by Dawama to substantiate the said claim. It must be recalled the basis in which Dawama computed the purported quantum meruit sum due to them as labour and services was over and above the RM5,349,258 which he had already awarded.

[79] The said amount was derived upon by Dawama by attaching the percentage of work carried out on the entire contract sum of RM23,140,804.77 being the primary claim amount. A percentage of the time spent in undertaking the pre-press works was also applied int the quantification.

[80] The arbitrator correctly captured and understood the method of how Dawama calculated the percentages and how it was applied to the claim of damages. This is contained in paras 501–503 of the final award. It is

reproduced for ease of reference:

> 501. Here Dawama claims that only 1.44% of the pre-press work remained to be completed. Dawama further contends that the time spent in undertaking the prepress work would be in the region of 72%. If that 1.44% is deducted from the said 72% of time that Dawama spent on the pre-press work, Dawama would have spent approximately 70.96% of the time involved to produce and distribute the 2015 new titles.
>
> 502. Dawama then arrives at the figure of RM16,420,715.06 for this claim by multiplying the said 70.96% to its primary claim, ie loss of profits of RM23,140,804.77.
>
> 503. Parties have submitted at length on the law of quantum merit.
>
> As stated by Nallini J in the case of *Spatial Ventures Sdn Bhd v Twintech Holdings Sdn Bhd* [2014] 8 MLJ 38.
>
> > The position in law is that an assessment for restitution on the basis of quantum meruit is in reality a measure of the costs of the work done, a matter whieh does not depend upon the contract ... This gives the plaintiff, not contractual damages, but restitution for the work done.

[81] From the reasoning of the arbitrator, it was clear to him that Dawama failed to prove their entitlement to the purported quantum meruit based on the established authorities. One such authority that was correctly referred to by the arbitrator was the decision of Nallini J (now FCJ) in *Spatial Ventures Sdn Bhd v Twintech Holdings Sdn Bhd* [2014] 8 MLJ 38. Nallini J in her usual clear words explained the applicable law on *quantum meruit* at paras 24–25 of the judgment which reads as follows:

> [24] *The position in law is that an assessment for restitution on the basis of quantum meruit is in reality a measure of the costs of the work done, a matter which does not depend upon the contract and therefore will not be trammelled or limited by the contract rate. This gives the plaintiff, not contractual damages, but restitution for the work done.* In *Ladder v Slowey* [1904] AC 442, the contract was to construct a tunnel and other works on certain land, and the builder was prevented from completing. The judge at first instance held that the measure of damages was the amount which the plaintiff builder had lost by exclusion from the works before their completion and not the value of the work done by the plaintiff whether at the market price or at the contract price. This was reversed on appeal the proper measure held to be the actual value of the work and materials, the issue of profit or loss upon completion being immaterial (see *MacGregor on Damages* at para 1155).
>
> [25] *It follows from the foregoing that the plaintiff cannot seek to recover damages on quantum meruit basis by reference to the scale in the contract or on the contract price. Therefore the plaintiff's claim premised on the scale costs in the letters of engagement is not a tenable basis on which to assess or award damages and accordingly the said basis, in accordance with the law, is rejected.* (Emphasis added.)

[82] Her Ladyship went on to state what is required to be considered when assessing damages when quantum meruit is being applied. The two considerations being: (i) what was the matter of fact is the work done; and (ii) how was the work going to be measured.

[83] In *Spatial Ventures,* the party seeking damages merely forwarded receipts and invoices to be assessed by the registrar. The court ruled that it was insufficient to allow a proper assessment to be done and the claim for damages were disallowed. The arbitrator cannot be faulted for arriving at this conclusion upon the guidance of *Spatial Ventures.*

[84] The arbitrator also relied on the case of *GDP Architects Sdn Bhd v Universiti Teknologi Mara* [2016] MLJU 943. Mary Lim J (now FCJ) held that the value of the plaintiff's work should not be based on the amounts found in the contractual arrangements that the plaintiff had with a subcontractor of the plaintiff in order to claim for damages for work done against the defendant. What was required is the actual value of work done. It is not the contractual value of work. Her Ladyship held as follows:

> I am further of the view that the value of the *plaintiff's work should not be based on the amounts found in the contractual arrangements that the plaintiff had with U-Wood. It should be based on the value of the work done.*
>
> Further, in *Spatial Ventures Sdn Bhd v Twintech Holdings Sdn Bhd* [2014] 8 ML 38, where liability had been conceded and the issue was about the assessment of damages, the court was in agreement with the defendant that in a quantum meruit claim, it was incumbent on the plaintiff to prove the quantum or amount of work done and the value of such work done. (Emphasis added.)

[85] The concept of quantum meruit was employed to recover reasonable remuneration for services or a reasonable price for goods which had been rendered or supplied under a contract in which the remuneration or price had not been agreed. The English case of *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 clearly explains this:

> ... work done as requested will be treated as having been performed under that contract; if contrary to their expectation, no contract was entered into. *Then the performance of the work is not referable to any contract of which the terms can be ascertained and the law simply impose an obligation on the party who made the request to pay a reasonable sum for such work as have been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution.* (Emphasis added.)

[86] In *Tanjung Teras Sdn Bhd v Kerajaan Malaysia* [2015] MLJU 2161; [2015] 9 CLJ 1002, the Court of Appeal held as follows in dealing with the juristic basis behind s 71 of the Contracts Act 1950:

A [35] Liability under se 71 is not based on any existing contract between the parties. Rather it is based on the equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party (see: *Craven-Ellis v Cannons Ltd Ramkrishna Shankarrao v Rangoobai and anr* AIR 1959 Bom 519; (1958) 60 BOMLR 459, *Abu Mohammed v Mohammed Kunju Lebba* B (1995) DMC 316 and *Pallonjee Eduljee and Sons v the Lonavala City Municipality* AIR 1937 Bom 417; (1937) 39 BOMLR 835). (Emphasis added.)

[87] Based on the authorities and the jurisprudence under quantum meruit, it is clear that the claim for quantum meruit can be made on the condition that C the said expenses were incurred by the claimant. It must be a cost that was incurred and must not costs that are based on any projection or anticipation of profits derived from a contractual amount.

D **[88]** In dismissing the purported quantum meruit claim, the arbitrator was of the view that Dawama had taken the profits of the entire 2015 new title orders into consideration when calculating the said purported quantum meruit sum.

E **[89]** This court agrees with the finding of the arbitrator. The calculation cannot be based on the entire contract value that Dawama anticipates to earn. Not only are the sums speculative, it is also uncertain at the point of computation as the works have yet to be completed. Furthermore, it was not disputed that the 2015 new title orders were not undertaken by Dawama. It is F odd for them to now argue they entitled to the entire work under the 2015 new title orders.

[90] Dawama referred extensively to the Victorian Court of Appeal case of *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510 to inter alia G support its position that the contract price can be taken into account to assess damages on a quantum meruit basis. In *Sopov*, one of the questions posed to the court was whether the contract price is a ceiling to the amount recoverable if a party elects to claim on a quantum meruit basis following the acceptance of the principal's repudiation of the contract. In answering the said question, the H court stated that 'where the claim is made on a quantum meruit the contract price does not impose a ceiling on the amount recoverable, though it may provide a guide to the reasonableness of the remuneration claimed. The price agreed on at the time of entry into the contract is evidence — and no more — of the view of the parties at that time as to the value of the work to be I performed'.

[91] This court agrees with DBP on the following issues; firstly, that the arbitrator is entitled to follow Malaysian cases since he was applying Malaysian law. Secondly, the *Sopov* case does not support the proposition that loss of profit

from the contract had the innocent party been allowed to carry out work should be taken into account in determining the value of work actually done.

[92] Thirdly, the Victorian Court of Appeal addressed the question of whether the contract price is the best evidence of value of the benefit conferred in a quantum meruit claim and was of the view that it was not. It held as follows:

> 26. *Nor is the contract price 'the best evidence' of the value of the benefit conferred.* As counsel for Kane pointed out, the contract price is struck prospectively, based on the parties' expectations of the future course of events.
>
> *The quantum meruit, on the other hand, is assessed with the benefit of hindsight, on the basis of the events which actually happened.*
>
> ...
>
> 29. *In our respectful view, her Honour was fully entitled to approach the assessment of the value of the works in the way she did, by requiring Kane Constructions to prove*:
>
> (a) *the total costs incurred and payments made by it in carrying out the works; and*
>
> (b) *that the amounts in question were fair and reasonable in the circumstances.* (Emphasis added.)

[93] The Victorian Court of Appeal approach is consistent with the case of *Spatial Ventures* with regard to determining the actual cost incurred in carrying out the works for assessing a quantum meruit claim.

[94] It is the view of this court that what can be considered is only the actual works carried out by Dawama. The costs incurred must be sufficiently shown and proven to the tribunal based on actual work done and not a mere estimation or projection.

[95] It is in this respect that that the arbitrator was not wrong in denying Dawama the quantum meruit damages. The arbitrator reasoned that he cannot allow profits to be considered. More so when the said loss of profits was based on a primary claim of RM23,140,804.77 which the arbitrator found Dawama not being entitled to. This can be seen at para 494 of the final award where he reasoned 'Therefore I find and hold that Dawama has not proven its claim for the primary claim of the 2015 new title orders and its claim for RM23m is dismissed'.

[96] This court, upon taking into account the context of his reasoning and the facts presented to the tribunal, does not find any error of law which merits an intervention under s 42 of the Act. It was after all, a finding of fact by the arbitrator that the Dawama failed to prove the damages it suffered.

[97] Ultimately, it is a failure on the part of Dawama to prove the purported quantum meruit sum. The simplistic approach of providing an estimation of the percentage of work done and time spent was not sufficiently proven at the proceedings. The arbitrator cannot be forced to accept the claim by the mere estimation and certainly this court too cannot disagree with such refusal.

[98] It is apposite for this court to repeat the principle of law stated in *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17 by Thomson CJ, quoting Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough for them to write down the particulars, and so to speak throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me the damages'. They have to prove it.

[99] For the above reasons, this court would dismiss the question 5 posed in this OS.

CONCLUSION

[100] In the foregoing, this court finds no reason to alter or vary the finding of the arbitrator. There is also no reason for this court to send this matter back to the arbitrator. The final award was written in a systematic and clear manner. It has to be taken in the proper context and any attempts to butcher and dissect the said award with the intention to look for errors cannot be supported.

[101] The OS is therefore dismissed with costs.

Originating summons dismissed with costs.

Reported by K Selvaraju